



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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TIMOTHY W. BOYER
Interim Executive Director

November 7, 2003

Dear Interested Party :

Enclosed are the Agenda, Issue Paper, and Revenue Estimate for the November 18, 2003, Business Taxes Committee meeting. This meeting will address the proposed amendments to Regulation 1684, *Collection of Use Tax by Retailers*.

Action 1 on the Agenda consists of items on which we believe industry and staff are in full agreement. Action 2 concerns proposed revisions to subdivision 1684(a) concerning the period of time during which an out-of-state retailer has a use tax collection duty.

If you wish to have any consent items (Action 1) discussed fully at the Committee meeting, you must contact a Board Member prior to Wednesday, November 12, 2003, to request removal of the item from the Consent Agenda. In addition, please notify Ms. Charlotte Paliani, Tax Policy Manager, after you contact a Board Member's Office. Ms. Paliani may be reached at (916) 324-1825.

If you are interested in other topics to be considered by the Business Taxes Committee, you may refer to the "Board Meetings and Committee Information" page on the Board's Internet web site (<http://www.boe.ca.gov/meetings/meetings.htm#two>) for copies of Committee discussion or issue papers, minutes, a procedures manual and calendars arranged according to subject matter and by month.

Thank you for your input on these issues and I look forward to seeing you at the Business Taxes Committee meeting at **9:30 a.m.** on **November 18, 2003**, in Room 121 at the address shown above.

Sincerely,

Ramon J. Hirsig
Deputy Director
Sales and Use Tax Department

RJH: ph

Enclosures

cc: (all with enclosures)

Honorable Carole Migden, Chairwoman
Honorable Claude Parrish, Vice Chairman
Honorable Bill Leonard, Member, Second District (MIC 78)
Honorable John Chiang, Member, Fourth District
Honorable Steve Westly, State Controller, C/O Ms. Marcy Jo Mandel
Ms. Carole Ruwart, Board Member's Office, First District (MIC 71)
Ms. Sabina Crocette, Board Member's Office, First District
Mr. Neil Shah, Board Member's Office, Third District (via e-mail)
Mr. Romeo Vinzon, Board Member's Office, Third District (via e-mail)
Ms. Margaret Pennington, Board Member's Office, Second District (via e-mail)
Mr. Lee Williams, Board Member's Office, Second District (MIC 78 and via e-mail)
Mr. Tim Treichelt, Board Member's Office, Second District (via e-mail)
Ms. Sylvia Tang, Board Member's Office, Fourth District (MIC 72)
Mr. Michael Thomas, Board Member's Office, Fourth District (MIC 72)
Mr. Timothy Boyer (MIC 73)
Acting Chief Counsel (MIC 83)
Ms. Janice Thurston (MIC 82)
Mr. Warren Astleford (MIC 82)
Mr. Jeffrey Graybill (MIC 82)
Ms. Jean Ogrod (via e-mail)
Mr. Jeff Vest (via e-mail)
Mr. David Levine (MIC 85)
Mr. Steve Ryan (via e-mail)
Mr. Rey Obligacion (via e-mail)
Ms. Jennifer Willis (MIC 70)
Mr. Dan Tokutomi (via e-mail)
Mr. Dave Hayes (MIC 67)
Ms. Charlotte Paliani (MIC 92)
Mr. Joseph Young (via e-mail)
Mr. Jerry Cornelius (via e-mail)
Mr. Jeffrey L. McGuire (via e-mail)
Mr. Vic Anderson (MIC 40 and via e-mail)
Mr. Larry Bergkamp (via e-mail)
Mr. Geoffrey E. Lyle (MIC 50)
Ms. Laureen Simpson (MIC 50)
Mr. Peter Horton (MIC 50)
Mr. Chuck Arana (MIC 50)

AGENDA — November 18, 2003 Business Taxes Committee Meeting
Regulation 1684, Collection of Use Tax by Retailers

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| <p>Action 1 — Agreed Upon Items</p> <p>Regulation 1684(a) and (b). Agenda, page 2.</p> | <p>Adopt proposed amendments to Regulation 1684 as agreed upon by staff and interested parties:</p> <ol style="list-style-type: none"> 1) Add paragraph numbers to subdivision 1684(a), and 2) Correct an inaccurate starting date in subdivision 1684(b). |
| <p>Action 2 — Duration of Use Tax Collection Duty</p> <p>Regulation 1684(a). Agenda, page 3. Issue Paper Alternative 1.</p> | <p>Adopt either:</p> <p>Staff recommendation to amend subdivision (a) to clarify that a retailer has a duty to collect use tax during the time their activities render them engaged in business in this state as defined by Revenue and Taxation Code (RTC) section 6203, through the end of the quarter during which the retailer finally ceases these activities, and for a period of one quarter thereafter. This recommendation incorporates the current administrative policy into the regulation.</p> <p style="text-align: center;">OR</p> <p>Interested parties recommendation that a retailer has a use tax collection duty only during such time the retailer is “engaged in business in this state” as defined by RTC section 6203.</p> |
| <p>Action 3 – Authorization to Publish</p> | <p>Recommend publication of amendments to Regulation 1684 as adopted in the above actions.</p> <p>Operative Date: none Implementation: 30 days following OAL approval</p> |

AGENDA — November 18, 2003 Business Taxes Committee Meeting
Regulation 1684, Use Tax Collection by Retailers

| Action Item | Staff and Interested Parties' Proposed Regulatory Language |
|--|---|
| <p>Action 1 — Agreed Upon Items</p> <p>Number paragraphs in subdivision 1684(a) and correct inaccurate date in subdivision 1684(b).</p> | <p>1684(a):</p> <p>(1) Retailers engaged in business in this state as defined in Section 6203 of the Revenue and Taxation Code and making sales of tangible personal property, the storage, use, or other consumption of which is subject to the tax must register with the Board and, at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable, at the time it becomes taxable, collect the tax from the purchaser and give the purchaser a receipt therefor.</p> <p>Any retailer deriving rentals from a lease of tangible personal property situated in this state is a “retailer engaged in business in this state” and is required to collect the tax at the time rentals are paid by his lessee.</p> <p>(2) The use of a computer server on the Internet to create or maintain a World Wide Web page or site by an out-of-state retailer will not be considered a factor in determining whether the retailer has a substantial nexus with California. No Internet Service Provider, On-line Service Provider, internetwork communication service provider, or other Internet access service provider, or World Wide Web hosting services shall be deemed the agent or representative of any out-of-state retailer as a result of the service provider maintaining or taking orders via a web page or site on a computer server that is physically located in this state.</p> <p>(3) A retailer is not “engaged in business in this state” based solely on its use of a representative or independent contractor in this state for purposes of performing warranty or repair services with respect to tangible personal property sold by the retailer, provided that the ultimate ownership of the representative or independent contractor so used and the retailer is not substantially similar. For purposes of this paragraph, “ultimate owner” means a stock holder, bond holder, partner, or other person holding an ownership interest.</p> <p>1684(b):</p> <p>(1) For the period commencing on January <u>April</u> 1, 1998 and ending on December 31, 2000, the retailer, including any of his or her representatives, agents, salespersons, canvassers, independent contractors, or solicitors, does not engage in those convention and trade show activities for more than seven days, in whole or in part, in this state during any 12-month period and did not derive more than ten thousand dollars (\$10,000) of gross income from those activities in this state during the prior calendar year;</p> |

AGENDA — November 18, 2003 Business Taxes Committee Meeting
Regulation 1684, Use Tax Collection by Retailers

| Action Item | Regulatory Language Proposed by Staff | Regulatory Language Proposed by Interested Parties |
|---|--|--|
| Action 2 - Duration of Use Tax Collection Duty. | Amendment to subdivision 1684(a): (a) RETAILERS ENGAGED IN BUSINESS IN STATE. (1) Retailers engaged in business in this state as defined in Section 6203 of the Revenue and Taxation Code and making sales of tangible personal property, the storage, use, or other consumption of which is subject to the tax must register with the Board and, at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable, at the time it becomes taxable, collect the tax from the purchaser and give the purchaser a receipt therefor. <u>Such retailers must collect the tax during the time that their activities render them “retailers engaged in business in this state,” as defined in Section 6203, and through the end of the quarter during which the retailer finally ceases these activities, and for a period of one quarter thereafter. Either the retailer or the Board may submit proof that a shorter or longer period more reasonably reflects the sales that resulted from the retailer’s in-state activities.</u> | Amendment to subdivision 1684(a): (a) RETAILERS ENGAGED IN BUSINESS IN STATE. (1) Retailers engaged in business in this state as defined in Section 6203 of the Revenue and Taxation Code and making sales of tangible personal property, the storage, use, or other consumption of which is subject to the tax must register with the Board and, at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable, at the time it becomes taxable, collect the tax from the purchaser and give the purchaser a receipt therefor. <u>Such retailers must collect the tax during the time that their activities render them “retailers engaged in business in this state,” as defined in Section 6203. There is no requirement that such retailers collect the tax after such retailers cease being engaged in business in this state.</u> |

Issue Paper Number **03 - 016**



BOARD OF EQUALIZATION
KEY AGENCY ISSUE

- ☐ Board Meeting
- ☒ Business Taxes Committee
- ☐ Customer Services and Administrative Efficiency Committee
- ☐ Legislative Committee
- ☐ Property Tax Committee
- ☐ Other

Duration of Nexus - Regulation 1684, Collection of Use Tax by Retailers

I. Issue

Should the Board adopt amendments to Regulation 1684, *Collection of Use Tax by Retailers*, 1) clarifying the length of time out-of-state retailers are responsible for collecting use tax on sales to in-state customers after they are no longer engaged in business in this state, and 2) making other minor formatting revisions and corrections?

II. Staff Recommendation

Staff recommends amending subdivision (a) to clarify that a retailer has a duty to collect use tax during the time its activities render it engaged in business in this state as defined by Revenue and Taxation Code (RTC) section 6203, through the end of the quarter during which the retailer finally ceases these activities, and for a period of one quarter thereafter. See Issue Paper (IP) pages 3-4 and agenda item 2.

In addition, staff recommends the creation of new paragraph numbers in subdivision 1684(a) and the correction on an inaccurate starting date in subdivision 1684(b)(1). See IP page 4 and agenda item 1.

Staff's proposed amendments are illustrated in Exhibit 2.

III. Other Alternative(s) Considered

Amend Regulation 1684 to provide that a retailer has a use tax collection duty only during such time as the retailer is "engaged in business in this state" as defined by RTC section 6203. Adopt the new paragraph numbers in subdivision 1684(a) and corrected starting date in subdivision 1684(b)(1). See IP page 7-9 and agenda item 2.

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IV. Background

Under the California Sales and Use Tax Law, charges for a transfer of tangible personal property for consideration are subject to sales or use tax unless excluded or exempt. Sales tax is imposed on the retailer for the privilege of selling tangible personal property at retail in this state. The use tax is complementary to the sales tax and is imposed on the storage, use or other consumption of tangible personal property in this state purchased from a retailer for storage, use, or other consumption in this state. The liability for use tax is on the purchaser who stores, uses, or otherwise consumes the property in this state. The purchaser's liability is not extinguished until the tax has been paid to and a receipt received from a retailer engaged in business in the state or from a retailer authorized by the Board to collect the use tax. A typical use tax transaction occurs when a retailer ships tangible personal property via common carrier from outside California to a purchaser in this state. Since the sale occurs outside the state, sales tax does not apply to the transaction. However, the use tax applies because the purchaser is buying the goods from a retailer for storage, use, or other consumption in California.

Under Revenue and Taxation Code (RTC) section 6203, a retailer engaged in business in this state has a duty to collect the use tax and to report and pay that tax to the Board. The section defines when a retailer is engaged in business in this state, that is, has nexus, for the purpose of the use tax collection duty. These criteria include:

- Maintaining, occupying, or using a place of business within the state. The use of the physical location may be permanent or temporary, and the location may be used by the retailer or the retailer's subsidiary or agent.
- Having a person in the state for the purpose of selling, delivering, installing, assembling, or taking orders for tangible personal property. The person may be a representative, agent, sales person, canvasser, independent contractor, or solicitor as long as he or she is operating under the authority of the retailer or its subsidiary. For purposes of this paper, these persons are referred to collectively as the "retailer or its agent."
- Deriving rentals from a lease of tangible personal property located in this state.

RTC section 6203 also addresses situations involving out-of-state retailers who enter the state to engage in convention or trade show activities. Pursuant to legislation effective January 1, 2001, a retailer who would be considered engaged in business in this state for having a representative here, as provided in subdivision 6203 (c)(2), is excluded from the definition of "engaged in business in this state" if it:

- Attends these events for 15 or fewer days during any 12 month period, and
- Derives \$100,000 or less of net income from these activities during the prior calendar year.

Notwithstanding these limitations, a retailer or its agent who makes sales, or takes orders for sales, of tangible personal property at a trade show or convention is considered a retailer engaged in business in the state with respect to reporting and paying sales or use tax on the sales, and on any sales made pursuant to the orders taken, at or during the convention or trade show.

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Regulation 1684, *Collection of Use Tax by Retailers* implements, clarifies and makes specific the provisions of RTC section 6203 and other RTC provisions related to use tax collection by retailers. The provisions of the regulation affected by this issue are:

- Subdivision (a) – Explains when a retailer engaged in business in this state has the duty to collect the use tax.
- Subdivision (b) – Makes specific the provisions concerning convention and tradeshow activities engaged in by out-of-state retailers.

Staff met with interested parties on July 30 and September 17, 2003 to discuss the proposed amendments to Regulation 1684. In response to these discussions, staff received comments from the following interested parties:

- Mr. Abe Golomb of Sales Tax Reduction Specialists (STRS), in a memorandum dated August 11, 2003.
- Mr. Joseph Vinatieri of Bewley Lassleben & Miller (Bewley), in a letter dated September 17, 2003.

Staff also received suggested alternate language from Bewley on October 23, 2003, and similar proposed language from Mr. Eric Miethke of Nielsen, Merksamer, Parrinello, Mueller (Nielsen). Nielsen agrees with the language proposed by Bewley.

Interested party comments are summarized and discussed in Section VI, Alternative 1, along with the suggested alternate language.

V. Staff Recommendation

A. Description of the Staff Recommendation

Staff recommends amending subdivision 1684(a) to clarify that a retailer has a duty to collect use tax not only during the time its activities render it engaged in business in this state as defined by Revenue and Taxation Code (RTC) section 6203, but also through the end of the quarter during which the retailer finally ceases these activities, and for a period of one quarter thereafter. In addition, staff recommends the creation of new paragraph numbers in subdivision 1684(a) and the correction on an inaccurate starting date in subdivision 1684(b)(1).

Staff's proposal to amend proposed subdivision (a) is in response to the Board's direction to consider the "appropriate length of time, if there is one, that the use tax collection obligation remains after nexus activities have ceased." The Board also directed staff to present at the first interested parties meeting "a survey of how this question is addressed in other states." The survey results are provided in Exhibit 4.

These directions resulted from an issue brought up during the Board hearing for Barnes & Noble.com (B&N.com) on April 23, 2003, concerning the period of time for which B&N.com was responsible for collecting use tax on sales to California customers. The Board found that B&N.com was engaged in business in the state as a result of the activities of its agent and affiliated entity, Barnes & Noble Booksellers (Booksellers), who distributed discount coupons for B&N.com through Booksellers' in-state retail stores in late 1999. The coupons expired on January 31, 2000. Staff contended that B&N.com's liability for reporting tax on sales to California customers should extend

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at least to March 31, 2000. Ultimately, the Board determined that, based on the facts presented, B&N.com's liability ended on January 31, 2000. However, the Board directed staff to consider the issue of the duration of the use tax collection duty and recommend a policy for consideration by the Business Taxes Committee (BTC).

In response to the Board's direction, staff proposes that Regulation 1684 provide a bright-line rule for imposing the use tax collection duty on a retailer similar to the current administrative standard. That is, an out-of-state retailer's responsibility for collecting and reporting use tax on sales to California customers should not only include the period during which the retailer is physically present in this state, but also extend to the end of the calendar quarter during which the retailer's physical presence ends and through the following calendar quarter. Staff also proposes that either the retailer or the Board may submit proof that a shorter or longer period more reasonably reflects the sales that resulted from the retailer's in-state activities.

Staff feels the bright-line rule and the attendant ability to document the effect of a retailer's in-state activities are reasonable. Generally, an out-of-state retailer's purposes for engaging in business in California are twofold: to make sales of its product and, equally, to enhance its market position by promoting its name and products through its active physical presence in the state. Marketing literature indicates that the time lag between an initial marketing effort and a sale, the marketing and sales cycle, can vary from 90 days to several years depending on the type of product being sold. Consequently, the effects of a retailer's in-state promotional efforts will endure for some period of time after the retailer physically leaves the state. Staff feels that between three to six months is a reasonable approximation of the duration of these effects. Staff also notes, however, that the relationship between marketing efforts and a targeted customer's decision to buy is dependent on a number of variables including the type or uniqueness of the product, price, competition, and type of promotion used. To account for these variables, the proposed language allows retailers and staff to provide documentation supporting a longer or shorter duration for imposition of the use tax collection duty.

Finally, staff notes that in-state marketing efforts are generally not haphazard actions or based on chance. Marketing literature emphasizes that planning and follow-up are key elements in an effective marketing and sales effort. Accordingly, a retailer physically engaging in marketing activities in California normally has a plan that details the means and purpose of the marketing effort. The retailer also reasonably expects that these efforts will lead to sales of its product to in-state customers. Consequently, there is a direct relationship between the retailer's in-state activities and subsequent sales made to California customers as a result of those activities.

The other amendments recommended by staff enhance the format of the regulation and correct a beginning date. Staff recommends that the paragraphs in subdivision (a) be numbered, since they deal with different provisions relating to being engaged in business in the state. In subdivision (b)(1), staff recommends correcting a starting date. This subdivision implements provisions enacted by Assembly Bill (AB) 258 (Statutes of 1997, Chapter 621), which had an operative date of April 1, 1998. The provisions in the regulation, therefore, should have had a starting date of April 1, 1998. The regulation currently shows a starting date of January 1, 1998.

Interested parties object to the proposed bright-line rule for a number of reasons and have proposed alternate language. In comments submitted to staff, both STRS and Bewley contend that the bright-line rule violates the holding in the Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (*Quill*). In addition, Bewley is of the opinion that "no statutory authority exists to allow expansion of the specific language in Revenue and Taxation Code section 6203." Bewley

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notes particularly that the language in RTC section 6203 concerning retailers engaged in trade show or convention activities limits a retailer's use tax collection duty to sales made at these events. Bewley also expresses concern about staff's proposed language for the bright-line rule because "it could lead to uncertainty as to when someone 'ceased' nexus generating activities." In support of these concerns both Bewley and Nielsen have proposed alternate amending language for Regulation 1684 that limits a retailer's use tax collection duty to that time during which the retailers are engaged in business in this state as defined by RTC section 6203. That is, either a retailer or its agent would need to be physically present in the state.

As a general response to interested parties' comments and proposed language, staff notes that limiting a retailer's use tax collection duty to only those periods during which a retailer or its agents are physically present in this state would create an opportunity for tax avoidance that would give out-of-state retailers an unfair tax advantage over in-state retailers. Under the interested parties' proposals, out-of-state retailers could send representatives into the state to engage in sales activities, but could limit the taking of orders and consideration to the time they were no longer in the state. In these circumstances, these retailers would have no duty to collect the use tax on their sales to customers in California. In-state retailers would have no similar opportunities for tax avoidance.

In response to interested parties' specific contentions, staff is of the opinion that Bewley and STRS read the *Quill* decision too broadly. While both interested parties are correct that *Quill* establishes a bright line as to when a state can require an out-of-state retailer to ***begin*** collecting sales or use tax, the decision does not address the concern covered by the proposed bright-line rule: when the duty ***ends***. Nor is this concern addressed in the other nexus cases decided by the Supreme Court. These cases were all decided on fact patterns concerning the initial determination of nexus under the Due Process and Commerce Clauses. In contrast, staff's proposal concerns retailers whose in-state activities have met the criteria established by the Due Process and Commerce Clauses for nexus and whose sales, subsequent to the retailer's disengagement from the state, result from these in-state activities. *Quill* does not address this fact pattern nor do the other nexus cases decided by the Court.

Staff is of the opinion that Bewley is incorrect in its statement that there is no statutory authority for the proposed amendment to Regulation 1684, and staff feels that Bewley's reference to the trade show exemption is misplaced. RTC section 6203(a) provides,

Except as provided by Sections 6292 and 6293, every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapter 3.5 (commencing with Section 6271) or Chapter 4 (commencing with Section 6351), shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

The first part of subdivision 6203(a) applies to, 1) a retailer engaged in business in this state, 2) who is making sales of tangible personal property. These are the two express conditions. The second part of the subdivision provides that the retailer must collect the use tax at the time of making the sale. Notably, it does not state that at the time of the sale the retailer must be physically present in this state. There is no express provision in the statute requiring that the retailer's salesperson must have one foot inside the state in order for the use tax collection duty to apply. Thus, the regulation

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will explain and implement the Board's position regarding the duration of time during which the use tax collection duty continues, following the time that the retailer has ceased its in-state activities. The statutory authority for the regulatory change is the very provision of section 6203 quoted above. Bewley also asserts by way of example that the trade show language in subdivision (b) of Regulation 1684 is based on section 6203, and Bewley argues that "if the California Legislature wanted the retailer to collect use tax on sales made after the retailer left California based upon advertising material disseminated at the California trade show, the Legislature could have so provided." Staff is of the opinion that Bewley misreads the nature of the trade show exemption.

Section 6203 sets forth California's nexus statute for the use tax collection duty. It includes a broad definition of when a retailer is engaged in business in this state, thereby requiring the retailer to collect the use tax on its sales from outside the state. As an exception to the broad definition of a retailer engaged in business in this state, subdivision (e) of section 6203, sets forth a limited exception to the use tax collection duty for out-of-state retailers whose only presence in this state is limited to attendance at trade shows, and for only limited numbers of visits and dollar volume of sales. The statute, and the similar provision in subdivision (b) of Regulation 1684, explain the parameters of the exception, and do require the retailer to report and pay tax arising from sales made and orders taken at the trade show. However, contrary to the implication in Bewley's assertion, the trade show exception does not *create* a duty to report and pay tax, it instead sets forth an exception to the broad and general statement of activities that render a retailer engaged in business in this state.

The staff proposal set forth in this issue paper merely incorporates the administrative position that staff has used for several years. It explains when the duty to collect the use tax ceases, following the retailer's severance of its nexus-generating activities. It is consistent with section 6203, which does not limit the use tax collection duty only to those periods when the retailer is physically present in this state at the time of making sales.

Cessation of Nexus Activities

Bewley also notes its concern that the language of the proposed subdivision "could lead to uncertainty as to when someone 'ceased' nexus generating activities."

Staff is of the opinion that the proposed language for the bright-line rule has no effect on the determination of the cessation of nexus generating activities. The date that a retailer ceases to be engaged in business in California is a factual determination based on the circumstances. In some cases, the facts are relatively clear. In other cases, the determination of the date of disengagement may require extensive documentation and investigation. The facts differ not because of criteria established by statute, regulation or administrative practice, but because of the retailer's unique business experience and plans. Moreover, the determination of when a retailer has ceased nexus-generating activities is independent of the issue of establishing how long the use tax collection duty continues.

B. Pros of the Staff Recommendation

- Provides specific criteria for the duration of the use tax collection duty.
- Enhances format of regulation.
- Corrects inaccurate provision in subdivision 1684(b)(1).

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C. Cons of the Staff Recommendation

Requires amendment of current regulation.

D. Statutory or Regulatory Change

No statutory change required. Staff's recommendation includes amending Regulation 1684.

E. Administrative Impact

Staff will be required to notify taxpayers of the amendments to the regulation through an article in the Tax Information Bulletin (TIB) and distribute the adopted regulation.

F. Fiscal Impact

1. Cost Impact

There will be no additional costs. Staff will notify taxpayers of the amendments to the regulation through a Tax Information Bulletin (TIB) article. The workload associated with the publication and distribution of the TIB is considered routine and any corresponding cost would be within the Board's existing budget.

2. Revenue Impact

None. The proposed regulation clarifies existing statute and policy. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact

Will provide bright-line guidelines for determining use tax collection duty.

H. Critical Time Frames

The proposed amendments provide regulatory language for current administrative policy and, therefore, have no operative date. Implementation will take place 30 days following approval of the regulation by the State Office of Administrative Law.

VI. Alternative 1

A. Description of the Alternative

Adopt an amendment to Regulation 1684 stating that a retailer has a use tax collection duty only during such time as the retailer is "engaged in business in this state" as defined by RTC section 6203. Adopt the new paragraph numbers in subdivision 1684(a) and corrected starting date in subdivision 1684(b)(1).

The proposal to number paragraphs in subdivision (a) and correct a date in subdivision (b) was presented at both interested parties meetings. Based on the absence of objections during these meetings and lack of comments in the correspondence received, interested parties appear to have no objection to adopting these proposed amendments.

Interested parties object to staff's proposed bright-line rule for three reasons. They feel the proposal:

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- Is contrary to the findings in the *Quill* decision ,
- Has no statutory authority in RTC section 6203, and
- Could lead to uncertainty as to when a retailer ceased nexus generating activities.

Accordingly, interested parties submitted proposed regulatory language that would limit retailers' use tax collection duty to those times their activities render them engaged in business in the state as defined in RTC section 6203. Interested parties' suggested language amends subdivision (a) as follows:

(1) Retailers engaged in business in this state as defined in Section 6203 of the Revenue and Taxation Code and making sales of tangible personal property, the storage, use, or other consumption of which is subject to the tax must register with the Board and, at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable, at the time it becomes taxable, collect the tax from the purchaser and give the purchaser a receipt therefor. Such retailers must collect the tax during the time that their activities render them "retailers engaged in business in this state," as defined in section 6203. There is no requirement that such retailers collect the tax after such retailers cease being engaged in business in this state.

Interested parties' concerns are detailed in the following sections.

Quill

In its comments, Bewley notes:

The substantial nexus standard as found in *Quill* provides that a retailer has the use tax collection responsibility only if there is a physical presence in the state. Nothing in *Quill* suggests that when a retailer leaves the state and is no longer physically present, that the state may force the retailer to continue to collect use tax. Staff's proposed language expands the concept of physical presence beyond the specific dictates of *Quill*.

Similarly, STRS notes:

It is my understanding that the U.S. Supreme Court's holding in the *Quill* case provides that a state such as California cannot require an out-of-state entity to collect their use tax until that out-of-state entity has a physical presence in their state. It is also my understanding that the Federal courts have not directly ruled on exactly when nexus with a state ends...

Even though, the Federal courts have not directly ruled on exactly when nexus ends, it is clear the Federal courts have ruled that physical presence in California is absolutely necessary before California can require any out-of-state entity to collect its use tax on sales to in-state customers/consumers. As such, if out-of-state entities cease to have physical presence in California these out-of-state entities obviously no longer have nexus with California and California has no direct statutory basis to require these entities to collect its use tax.

Statutory Authority

In its comments, Bewley notes the following:

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No statutory authority exists to allow expansion of the specific language in Revenue and Taxation Code Section 6203. In point of fact, only recently did the Legislature provide a safe harbor for convention and trade shows in California. I note that the only sales subject to use tax collection are those sales where orders were taken in California at the trade show. The retailer, in that situation only, is responsible for use tax collection on the sales into California for the orders that were taken while the retailer was physically present in California. There is no “continuing obligation” on the part of the retailer to collect use tax on any other sales that it procures as a result of dissemination of sales material while in California. If the Legislature wanted the retailer to collect use tax on sales made after the retailer left California based upon advertising material disseminated at the California trade show, the Legislature could have so provided. What is proposed by staff in the changes to Regulation 1684 is no different.

Cessation of Nexus Generating Activities

Finally, Bewley notes “further concern regarding the language of the proposed subdivision as it could lead to uncertainty as to when someone ‘ceased’ nexus generating activities.”

B. Pros of the Alternative

- Enhances format of regulation.
- Corrects inaccurate provision in subdivision 1684(b)(1).
- Provides specific criteria for imposition of the use tax collection duty.

C. Cons of the Alternative

Will result in some revenue loss.

D. Statutory or Regulatory Change

No statutory change required. Recommendation includes amending Regulation 1684.

E. Administrative Impact

Staff will need to be informed of policy change.

F. Fiscal Impact

1. Cost Impact

There will be no additional costs. Staff would be notified as part of normal routine. Any corresponding cost would be within the Board’s existing budget.

2. Revenue Impact

A full revenue estimate cannot be developed. However, the alternative would result in the collection of less revenue than the staff version. See Revenue Estimate (Exhibit 1).

Issue Paper Number: **03 - 016**

G. Taxpayer/Customer Impact

Will provide specific guidelines for determining use tax collection duty.

H. Critical Time Frames

The proposed amendment to subdivision (a) clarifies current statutory provisions and, therefore, has no operative date. Implementation will take place 30 days following approval of the regulation by the State Office of Administrative Law.

Prepared by: Tax Policy Division, Sales and Use Tax Department

Current as of: October 31, 2003

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DURATION OF NEXUS – REGULATION 1684 COLLECTION OF USE TAX BY RETAILERS

Staff Recommendation

Staff recommends amending subdivision (a) to clarify that a retailer has a duty to collect use tax during the time its activities render it engaged in business in this state as defined by Revenue and Taxation Code (RTC) section 6203, through the end of the quarter during which the retailer finally ceases these activities, and for a period of one quarter thereafter.

In addition, staff recommends the creation of new paragraph numbers in subdivision 1684(a) and the correction on an inaccurate starting date in subdivision 1684(b)(1).

Other Alternative(s) Considered

Amend Regulation 1684 to provide that a retailer has a use tax collection duty only during such time the retailer is “engaged in business in this state” as defined in RTC section 6203. Adopt the new paragraph numbers in subdivision 1684(a) and corrected starting date in subdivision 1684(b)(1).

Background, Methodology, and Assumptions

Staff Recommendation:

There is nothing in the proposed change to Regulation 1684 that would impact revenues because the proposal incorporates current administrative policy into the regulation.

Alternative 1

Interested parties propose alternate language limiting the use tax collection duty to that time a retailer is engaged in business in the state as defined in RTC section 6203. The revenue impact of not adopting the staff recommendation cannot be definitively estimated since staff kept no statistics on the revenue generated from the current administrative policy. However, the Barnes & Noble.com (B&N.com) case does provide an indication of the potential revenue impact. In the B&N.com case, the Board found that B&N.com was engaged in business in the state as a result of the activities of its agent and affiliated entity, Barnes & Noble Booksellers (Booksellers). Booksellers distributed discount coupons for B&N.com through Booksellers’ in-state retail stores through December 19, 1999. The coupons expired on January 31, 2000.

Revenue Estimate

Staff contended that B&N.com's liability for reporting tax on sales to its California customers should extend at least to March 31, 2000. B&N.com contended that its coupon distribution ended on December 19, 1999, it did not distribute coupons in California during the first quarter of 2000, and a reduction in the measure of tax was warranted. Ultimately, the Board determined that, based on the facts presented, B&N.com's liability ended on January 31, 2000. As a result of the Board's ruling the retailer's tax liability was reduced by \$431,000.

Since B&N.com was a single case and the number of retailers in similar circumstances is unknown, a full revenue estimate cannot be developed.

Revenue Summary

The staff recommendation has no revenue effect because the regulation incorporates current administrative policy.

We cannot estimate the revenue impact of Alternative 1. However, in those circumstances where a retailer is no longer engaged in business in California yet continues to make Internet or mail order sales to California customers, Alternative 1 would result in the collection of less revenue than the staff recommendation.

Preparation

Bill Benson, Jr., Research and Statistics Section, Legislative Division, prepared this revenue estimate. Mr. Dave Hayes, Manager, Research and Statistics Section, Legislative Division, and Ms. Charlotte Paliani, Tax Policy Manager, Sales and Use Tax Department reviewed this revenue estimate. For additional information, please contact Mr. Benson at (916) 445-0840.

Current as of October 27, 2003

Duration of Nexus – Regulation 1684, *Collection of Use Tax by Retailers*
Comparison of Language Proposed by Staff and Interested Parties
Current as of October 23, 2003

| Action Item | Regulatory Language Proposed by Staff | Regulatory Language Proposed by Interested Parties | Summary Comments |
|--|--|--|--|
| ACTION 2 - | | | |
| Duration of the use tax collection duty for retailers no longer engaged in business in the state | <p>Regulation 1684, Collection of Use Tax by Retailers</p> <p>(a)(1)Retailers engaged in business in this state as defined in Section 6203 of the Revenue and Taxation Code and making sales of tangible personal property, the storage, use, or other consumption of which is subject to the tax must register with the Board and, at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable, at the time it becomes taxable, collect the tax from the purchaser and give the purchaser a receipt therefor. <u>Such retailers must collect the tax during the time that their activities render them “retailers engaged in business in this state,” as defined in Section 6203, and through the end of the quarter during which the retailer finally ceases these activities, and for a period of one quarter thereafter. Either the retailer or the Board may submit proof that a shorter or longer period more reasonably reflects the sales that resulted from the retailer’s in-state activities.</u></p> | <p>Regulation 1684, Collection of Use Tax by Retailers</p> <p>(a)(1)Retailers engaged in business in this state as defined in Section 6203 of the Revenue and Taxation Code and making sales of tangible personal property, the storage, use, or other consumption of which is subject to the tax must register with the Board and, at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable, at the time it becomes taxable, collect the tax from the purchaser and give the purchaser a receipt therefor. <u>Such retailers must collect the tax during the time that their activities render them “retailers engaged in business in this state,” as defined in Section 6203. There is no requirement that such retailers collect the tax after such retailers cease being engaged in business in this state.</u></p> | <p>The staff suggestion proposes that the use tax collection duty extends to the end of the quarter during which the retailer is no longer engaged in business in the state and for one additional quarter.</p> <p>The interested parties’ suggestion proposes that a retailer’s use tax collection duty ends at the point the retailer is no longer engaged in business in the state.</p> |

Proposed Amendments to Regulation 1684. Collection of Use Tax by Retailers

References: Sections 6203, 6204, 7051.3 and 6226, Revenue and Taxation Code.

Section 513(d)(3)(A), Internal Revenue Code (26 USC).

(a) RETAILERS ENGAGED IN BUSINESS IN STATE.

(1) Retailers engaged in business in this state as defined in Section 6203 of the Revenue and Taxation Code and making sales of tangible personal property, the storage, use, or other consumption of which is subject to the tax must register with the Board and, at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable, at the time it becomes taxable, collect the tax from the purchaser and give the purchaser a receipt therefor. Such retailers must collect the tax during the time that their activities render them "retailers engaged in business in this state," as defined in Section 6203, and through the end of the quarter during which the retailer finally ceases these activities, and for a period of one quarter thereafter. Either the retailer or the Board may submit proof that a shorter or longer period more reasonably reflects the sales that resulted from the retailer's in-state activities.

Any retailer deriving rentals from a lease of tangible personal property situated in this state is a "retailer engaged in business in this state" and is required to collect the tax at the time rentals are paid by his lessee.

(2) The use of a computer server on the Internet to create or maintain a World Wide Web page or site by an out-of-state retailer will not be considered a factor in determining whether the retailer has a substantial nexus with California. No Internet Service Provider, On-line Service Provider, internetwork communication service provider, or other Internet access service provider, or World Wide Web hosting services shall be deemed the agent or representative of any out-of-state retailer as a result of the service provider maintaining or taking orders via a web page or site on a computer server that is physically located in this state.

(3) A retailer is not "engaged in business in this state" based solely on its use of a representative or independent contractor in this state for purposes of performing warranty or repair services with respect to tangible personal property sold by the retailer, provided that the ultimate ownership of the representative or independent contractor so used and the retailer is not substantially similar. For purposes of this paragraph, "ultimate owner" means a stock holder, bond holder, partner, or other person holding an ownership interest.

(b) CONVENTION AND TRADE SHOW ACTIVITIES. For purposes of this subdivision, the term "convention and trade show activity" means any activity of a kind traditionally conducted at conventions, annual meetings, or trade shows, including, but not limited to, any activity one of the purposes of which is to attract persons in an industry generally (without regard to membership in the sponsoring organization) as well as members of the public to the show for the purpose of displaying industry products or to stimulate interest in, and demand for, industry products or services, or to educate persons engaged in the industry in the development of new products and services or new rules and regulations affecting the industry.

Except as provided in this paragraph, a retailer is not "engaged in business in this state" based solely on the retailer's convention and trade show activities provided that:

(1) For the period commencing on ~~January~~ April 1, 1998 and ending on December 31, 2000, the retailer, including any of his or her representatives, agents, salespersons, canvassers, independent contractors, or solicitors, does not engage in those convention and trade show activities for more than seven days, in whole or in part, in this state during any 12-month period and did not derive more than ten thousand dollars (\$10,000) of gross income from those activities in this state during the prior calendar year;

(2) For the period commencing on January 1, 2001, the retailer, including any of his or her representatives, agents, salespersons, canvassers, independent contractors, or solicitors, does not engage in those convention and trade show activities for more than fifteen days, in whole or in part, in this state during any 12-month period and did not derive more than one hundred thousand dollars (\$100,000) of net income from those activities in this state during the prior calendar year.

A retailer coming within the provisions of this subdivision is, however, "engaged in business in this state," and is liable for collection of the applicable use tax, with respect to any sale of tangible personal property occurring at the retailer's

convention and trade show activities and with respect to any sale of tangible personal property made pursuant to an order taken at or during those convention and trade show activities.

(c) RETAILERS NOT ENGAGED IN BUSINESS IN THIS STATE. Retailers who are not engaged in business in this state may apply for a Certificate of Registration - Use Tax. Holders of such certificates are required to collect tax from purchasers, give receipts therefor, and pay the tax to the Board in the same manner as retailers engaged in business in this state. As used in the regulation, the term "Certificate of Registration - Use Tax" shall include Certificates of Authority to Collect Use Tax issued prior to September 11, 1957.

(d) USE TAX DIRECT PAYMENT PERMIT EXEMPTION CERTIFICATES. Notwithstanding subdivisions (a) and (b), a retailer who takes a use tax direct payment exemption certificate in good faith from a person holding a use tax direct payment permit is relieved from the duty of collecting use tax from the issuer on the sale for which the certificate is issued. Such certificate must comply with the requirements of Regulation 1699.6, Use Tax Direct Payment Permits.

(e) TAX AS DEBT. The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation that it was tax constitute debts owed by the retailer to the state.

(f) REFUNDS OF EXCESS COLLECTIONS. Whenever the Board ascertains that a retailer has collected use tax from a customer in excess of the amount required to be collected or has collected from a customer an amount which was not tax but was represented by the retailer to the customer as being use tax, no refund of such amount shall be made to the retailer even though the retailer has paid the amounts so collected to the state. Section 6901 of the Revenue and Taxation Code requires that any overpayment of use tax be credited or refunded only to the purchaser who made the overpayment.

Draft

Survey of State Practices on Duration of Nexus Business Taxes Committee Meeting Topic - November 19, 2003

The attached matrix summarizes the state practices concerning the duration of nexus for out-of-state vendors. California State Board of Equalization staff gathered this information from a variety of sources:

- Responses to an inquiry placed on the Federation of Tax Administrators bulletin board, Legal Listserve
- Research in the *CCH – State Tax Reporter (CCH)*
- E-mails sent to state tax and revenue agencies
- E-mails sent to representatives of states participating in the Border States Caucus

The matrix lists 49 states in alphabetical order, provides the source of the information, summarizes the state policy on duration of nexus, and, if available, gives the statutory, regulatory, or administrative authority for the policy.

Five states do not impose a sales or use tax: Alaska, Delaware, Montana, New Hampshire, and Oregon. This information is noted in the state policy column.

Staff obtained information on 38 of the remaining 44 states. Thirty of the states responded to the inquiries. The survey generally uses the information provided directly by the states. However, for those states that did not respond, staff relied on secondary sources including *CCH* and information provided by a representative of the Multistate Tax Commission.

The results were the following:

- Seven states have policies requiring a retailer to collect and report tax on sales into their states after physical disengagement. Michigan, Minnesota, South Dakota, and Texas require retailers to collect and report for up to 12 months after no longer being engaged in business in the state. Washington State requires up to five years. Indiana and Kentucky have no time limit on this responsibility. It continues indefinitely.

The states have differing authorities for requiring collection after disengagement. The Texas and Washington State policies are regulatory. The Michigan and Minnesota policies were published in administrative bulletins or notices. The policies reported by Indiana, Kentucky, and South Dakota appear to be unpublished administrative policies based on interpretation of current statutory language.

- For twenty-four states, responsibility for collecting and reporting use tax ends, or appears to end, at or shortly after an out-of-state retailer physically disengages from the state. Two of these states, Ohio and South Carolina, require out-of-state retailers to report sales for intervening periods if the retailers again engage in business in the state.
- Three states appear to make determinations based on a case-by-case analysis.
- Eleven states either have no policy, no established standard, or no published policy.

The table on page 2 summarizes the results of the survey. Detailed information is provided on the attached matrix, which is on pages 3 through 9.

Summary of Survey Results

| State Policy | No. of States | Names of States |
|---|----------------------|---|
| Responsibility to collect and report tax continues after physical disengagement | 7 | Indiana, Kentucky, Michigan, Minnesota, South Dakota, Texas, Washington State |
| Responsibility for collecting and reporting tax ends immediately upon physical disengagement or shortly thereafter | 20 | Arkansas, Alabama, Florida, Georgia, Iowa, Maryland, Massachusetts, Missouri, Nevada, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming |
| Nexus ends at point of physical disengagement. However, if nexus is reestablished, the retailer must report sales made in the intervening period | 2 | Ohio, South Carolina |
| Nexus appears to end at the point of physical disengagement because registration certificates must be returned or destroyed within a quarter calendar or less after the point of physical disengagement | 2 | Idaho, Kansas |
| Depends on factual situation | 3 | Arizona, Hawaii, Illinois, |
| No published policy / No response / No standard | 10 | Colorado, Connecticut, Louisiana, Maine, Mississippi, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma |

| State | Source | State Policy on Duration of Nexus / Other Information | Authority |
|-------------|--|--|-----------------|
| Alabama | Alabama Department of Revenue – Telephone call from Ms. Lee Ann Rouse, Nexus Unit, on 6-17-03 | Alabama has no set timeframe for nexus. As long as a retailer is registered with the state, the retailer must collect and report tax. However, once the retailer ends physical nexus and informs the state that it is no longer active in the state, the retailer is not required to collect tax on sales to Alabama customers. | |
| Alaska | | No sales or use tax imposed by the state | |
| Arizona | Arizona Department of Revenue – E-mail from Mr. Steve Wilkins on 5-22-03 | Depends on the answers to the following questions: <ul style="list-style-type: none"> • How are sales continuing to be made? • How are new customers finding out about the product? • How will shipment of the product into the state be made? | |
| Arkansas | Arkansas Department of Finance and Administration – E-mail from Mr. Danny Walker, Administrator, Office of Field Audit, on 6-26-03 | Once it is established that a taxpayer does not have nexus with the State of Arkansas, we can not require a taxpayer to collect tax on sales made into Arkansas. The question concerned a company that establishes nexus in a state and builds a market for their product and then the company withdraws from that state. The company continues to make sales into that state as a result of a market for their product that was previously established during the timeframe that they did have nexus in that state. To satisfy this concern, the determination must be made at the time of sale that a company either has nexus and is required to collect tax on sales made into this state or does not have nexus and is not required to collect tax on sales made into this state. | |
| Colorado | Colorado Department of Revenue | Due to limited resources, unable to perform an analysis of question. | |
| Connecticut | CCH – State Tax Reporter | No published policy | N/A |
| Delaware | | No sales or use tax imposed by the state | |
| Florida | Telephone call to Florida Department of Revenue – 6-30-03 | An out-of-state retailer without nexus in the state may voluntarily register to collect use tax. However, an out-of-state retailer has no obligation to collect use tax if no longer engaged in business in the state. | |
| Georgia | Georgia Department of Revenue – E-mail from Ms. Colleen O. Ramirez, 6-18-03 | If an out-of-state dealer (retailer/wholesaler) no longer meets Georgia's nexus requirements, there is no need for the dealer to remain registered for sales tax collection purposes. Under Georgia law, the out-of-state dealer would file a final return and discontinue sales tax registration in Georgia. Georgia follows the nexus standards set forth in the Supreme Court decisions in National | O.C.G.A. 48-8-2 |

| State | Source | State Policy on Duration of Nexus / Other Information | Authority |
|--------|---|---|--|
| | | Bellas Hess and Quill Corporation. | |
| Hawaii | Hawaii Department of Taxation – E-mail from Ms. Linn Garcia, Tax Specialist, Technical Section, Rules Office, on 7-1-03 | Nexus would exist as long as sales are made which can be related to the last nexus creating activity, i.e., you can connect the activity to the sales. The nexus is not automatically terminated with the removal of the nexus creating activity. The test of definition of a "nexus creating activity" is one which enables the taxpayer to establish or maintain a market for the taxpayer's products. As long as the effects of the last market creating or maintaining activity remains, the nexus link should continue. The market creating and maintaining legacy would be tied-in to the extent and intensity of the market creating activity. There is no specific time frame or limit, this would be determined on a case-by-case basis. | . |
| Idaho | CCH – State Tax Reporter Idaho State Tax Commission – E-mail from Mr. James Husted, 6-16-03 | No published policy. However, permit holders are required to notify the Tax Commission in writing immediately upon complete or partial termination of a permit holder's business. The permit holder must return the permit with the notice or destroy it. "The Idaho Sales Tax Act does not give an answer to the question you have raised. The Idaho nexus statute is essentially as broad as it possibly can be. Idaho Code Section 63-3611 states, in relevant part: 63-3611. RETAILER ENGAGED IN BUSINESS IN THIS STATE. "Retailer engaged in business in this state" as used in this chapter means any retailer who (1) Engages in recurring solicitation of purchases from residents of this state or otherwise purposefully directs its business activities at residents of this state; and (2) Has sufficient contact with this state, in accordance with the constitution of the United States, to allow the state to require the seller to collect and remit use tax on sales of tangible personal property or services made to customers in this state. It seems clear that nexus can be lost if a company ceases operations and no longer has substantial contacts with a state. The Idaho Sales Tax Act is silent as to when nexus would be lost. The State Tax Commission has not issued any opinions or rulings on the issue." | Idaho Rule, 35.01.02.070. This is regulatory. Idaho Code Section 63-3611 |

| State | Source | State Policy on Duration of Nexus / Other Information | Authority |
|----------|--|--|---|
| Illinois | CCH – State Tax Reporter | No published policy. However, a taxpayer under the Retailer’s Occupation Tax Act that sells out or discontinues a business is required to file returns regularly and pay tax resulting from retail sales made up to the date the business was sold or discontinued. Taxpayers are not considered to have discontinued business as long as they continue to collect receipts on which they are required to remit tax to the Department. | Illinois Administration Code 130.1601. This is regulatory. |
| | Illinois Department of Revenue – E-mail from Ms. Mitzi Brandenburg, 6-17-03 | Out-of-state retailers “maintaining a place of business” in Illinois must register with the state and collect use tax on property shipped into the state. | Illinois Administrative Code sections 150.021 and 150.801. |
| Indiana | Indiana Department of Revenue – E-mail from Mr. Lorenzo Parks, on 6-19-03 | If a retailer sells taxable property within the state of Indiana, the retailer is responsible for collecting and remitting sales tax on the transaction. If a retailer no longer has a physical presence or an agent in the state, the retailer is still responsible for collecting, reporting and remitting the tax. Nexus is created through association with the buyer. The retailer is doing business and getting the benefit of a sale into the state. | Interpretation of Indiana Code sections 6-2.5-3.1, 2, 6, 7 and 8. |
| Iowa | Iowa Department of Revenue and Finance – E-mail from Mr. Darwin Clupper, Technical Tax Specialist, Policy Section, on 7-2-03 | Having considered the question at one point, Iowa has the following standard: A retailer is no longer obligated to collect Iowa’s sales or use tax when it 1) has withdrawn its physical presence from Iowa to the point that it no longer has a “substantial nexus” with this state, and 2) this withdrawal is intended to last permanently or indefinitely. If there were a situation in which a retailer enters Iowa with the deliberate intent to built up a stock of customers who will purchase its goods over the long term and then deliberately withdraws its physical presence here, Iowa might attempt to apply a different standard to that retailer. For now, the above “two prong” test is the only one Iowa utilizes. | |
| Kansas | CCH – State Tax Reporter | When a retailer ceases to do business, the retailer shall notify the department of the date of the last day of business operations, return its certificate for cancellation, remit all taxes, and file its final return during the month that follows the sale of the business. | Kansas Administrative Regulation 92-19-6a |
| Kentucky | Kentucky Revenue Cabinet – E-mail from Mr. Richard Dobson, Division of Tax Policy, on 6-23-03 | Once a remote seller has established nexus and registered to collect KY sales and use tax, our assumption is that this business activity will continue indefinitely. We really have no precedent here in KY that would provide clear guidelines on the issue at hand. In theory, we would be inclined to | |

| State | Source | State Policy on Duration of Nexus / Other Information | Authority |
|---------------|--|--|---|
| | | anticipate a residual effect from the in-state business presence that still was contributing to sales activities. What about the sales accounts still open that were established during the tenure of the in-state sales rep? The burden of proof would be upon the retailer to demonstrate why nexus no longer existed. | |
| Louisiana | Louisiana Department of Revenue – E-mail from Ms. Kelli Jumper, Policy Services Division, on 6-30-03 | Louisiana has no formal policy or court case that addresses the issue. | |
| Maine | CCH – State Tax Reporter | No published policy | N/A |
| Maryland | Comptroller of Maryland – E-mail from Mr. Daniel Riley, Chief Auditor, on 6-19-03 | Article 11-702 of the Tax – General Article of the Annotated Code provides that a person engaged in the business of an “out-of-state” vendor is required to obtain a sales tax license from the Comptroller. Article 11-701 defines what it means to “engage in the business of an out-of-state vendor.” There is nothing in Maryland Statutes that requires a vendor to remain licensed for any period of time following the period in which the vendor has no nexus with this State. | |
| Massachusetts | Massachusetts Dept. of Revenue (DOR) - E-mail from Mr. Ted Lauper, Tax Counsel, on 5-22-03 | “There is no case in Massachusetts on point that I know of and DOR hasn't issued any public written statement on the subject of how long sales tax nexus continues after the activity that initially created the nexus has ceased. The informal consensus of opinion was that a taxpayer either had nexus or they didn't and MA DOR probably would not attempt to assert nexus for periods in which the taxpayer did not have some presence in the state. We thought that assertion of nexus for other periods could create a constitutional issue.” | |
| Michigan | CCH – State Tax Reporter | Once nexus is established by a seller for use tax collection purposes, nexus shall exist from the date of contact forward for the remainder of that month and for the following 11 months. Proof may be submitted by the seller or Department that a longer or shorter period reasonably reflects the sales proximately caused by the seller's in-state contacts. | Michigan Revenue Administrative Bulletin 1999-1 |
| Minnesota | Minnesota Department of Revenue – E-mail from Mr. Don Harens on 6-23-03 | An out-of-state business is maintaining a place of business in this state and has sufficient nexus to be required to collect Minnesota sales or use tax when it conducts business activity in Minnesota on at least four days during a 12-month period. The out-of-state business is required to register, collect and | Minnesota Department of Revenue Notice No. 00-10. This is an administrative |

| State | Source | State Policy on Duration of Nexus / Other Information | Authority |
|----------------|---|---|--|
| | | remit Minnesota sales or use tax on sales made from outside Minnesota to destinations in Minnesota starting on the fourth day of such activity and for all sales made that day through the following 11 calendar months. | release. |
| Mississippi | CCH – State Tax Reporter | No published policy | N/A |
| Missouri | Missouri Department of Revenue – E-mail from Ms. Diane Luebbering on July 10, 2003 | Missouri does not have any statutes or regulations that specifically require an out of state retailer to continue to collect and report sales and use tax after the retailer no longer has nexus with Missouri. | |
| Montana | | No sales or use tax imposed by the state | |
| Nebraska | Mr. Beau Baez - MTC | No duration nexus standard | Information provided by Nebraska Department of Revenue in response to an MTC survey conducted in 1998. |
| Nevada | Nevada Department of Taxation – Telephone call to Department on 7-1-03 | Out-of-state retailers who are no longer engaged in business in the state are not required to continue collecting sales or use tax. However, Nevada does encourage these retailer to register for the voluntary collection of tax on sales to customers in Nevada. | |
| New Hampshire | | No sales or use tax imposed by the state | |
| New Jersey | CCH – State Tax Reporter | No published policy | N/A |
| New Mexico | State of New Mexico – E-mail from Mr. Jerry Montoya on 5-29-03 | “New Mexico does not have any statutes, regulations, rulings, administrative practices or court decisions regarding this matter. As such, we really cannot set any kind of time frame for extended periods of responsibility for reporting gross receipts and compensating tax.” | |
| New York | CCH – State Tax Reporter Telephone call to New York State Department of Taxation and Finance – 6-30-03 | Law and regulations do not specifically address duration of nexus. However, it appears there is no nexus beyond ceasing business in the state. Regulation requires the return of a certificate of authority or certificate of registration “within 20 days of a registrant’s ceasing to do business.” Confirmation that, unless an out-of-state business wishes to voluntarily collect tax, a business has no obligation to collect the use tax once it is no longer engaged in business in the state. | Regulation Section 533.1(f) |
| North Carolina | North Carolina Department of Revenue – Per telephone call to Sales and Use Tax Division on | Generally, if an out-of-state retailer is not engaged in business in North Carolina, it has no responsibility for collecting or reporting sales or use tax on sales made into North Carolina. | |

| State | Source | State Policy on Duration of Nexus / Other Information | Authority |
|----------------|--|--|---|
| | 7-1-03 | | |
| North Dakota | CCH – State Tax Reporter | No published policy | N/A |
| Ohio | CCH – State Tax Reporter | “When an out-of-state seller no longer has nexus creating contracts, the out-of-state seller may cancel its registration and stop collecting and remitting use tax on its sales in this state. However, if the out-of-state seller reestablishes nexus by engaging in any nexus creating activities within twelve months of its registration cancellation, the Department of Taxation will presume that the new contact remains part of a regular presence in this state. Thus, the out-of-state seller continued to have nexus during the interim period. The out-of-state seller will be required to reinstate its registration and pay tax on all its sales in this state during the interim period, and continue collecting tax on a prospective basis.” | Ohio Department of Taxation, <i>Use Tax Information Release ST 2001.01</i> , September 2001 |
| Oklahoma | Oklahoma Tax Commission – E-mail from Mr. Mike Pillow, on 6-18-03 | Oklahoma rules do not specify how long a vendor is responsible for the collection of use tax after contact is no longer maintained. | |
| Oregon | | No sales or use tax imposed by the state | |
| Pennsylvania | Pennsylvania Department of Revenue – E-mail 6-18-03 | Once nexus has been terminated, the requirement to collect and report tax stops. | Regulation 56.01 |
| Rhode Island | Rhode Island Division of Taxation – E-mail from Mr. Paul McVay, 6-17-03 | The out-of-state retailer is relieved from collecting sales/use taxes when it no longer has nexus with Rhode Island. There is no time period where collection of tax must continue. | |
| South Carolina | Mr. John Rogers – South Carolina Dept. of Revenue | Nexus ends when physical presence ends. However, if physical presence is re-established, nexus resumes. In addition, nexus is asserted on the intervening period between physical presence in the state. | Administrative policy |
| South Dakota | South Dakota Department of Revenue and Regulation – E-mail from Ms. Charlene Carmody, Revenue Agent, on June 23, 2003. | South Dakota statutes do not define a time period, nor has state policy been challenged in courts. As a general policy, once a retailer has discontinued all nexus creating activities and has done so consistently for at least a 12 month period, we would then consider the retailer as not having nexus. Tax is due for sales made during the 12 month period after the retailer has stopped all nexus activity. After the 12 month period the sales tax license can be canceled by filing a final return. If the company is using the cash basis method of accounting, the company is still responsible for reporting and remitting sales tax on the accounts receivable receipts as they are collected. | |

| State | Source | State Policy on Duration of Nexus / Other Information | Authority |
|---------------|---|---|---|
| Tennessee | Tennessee Department of Revenue – E-mail from Mr. Ray Todd, Manager of Taxpayer Education, on 6-17-03 | The issue is one of whether a sufficient physical presence (nexus) exists. As long as the physical presence exists, the dealer is responsible for the tax. When it can be demonstrated that all presence is removed, the business is no longer responsible for the tax after that time. | |
| Texas | CCH – State Tax Reporter | An out-of-state seller who has been engaged in business in Texas continues to be responsible for collection of use tax on sales made into Texas for 12 months after the seller ceases to be engaged in business in Texas. | Texas Administrative Code, Rule 3.286(b)(2). This is regulatory. |
| Utah | Utah State Tax Commission – E-mail from Jane Wiseman on 6-17-03 | Utah's tax code and rules do not give us the discretion to extend the time a company is obligated to collect our tax once their nexus with us has ended. We really do not have any code references because this issue is not discussed. When a company no longer has Utah nexus, they are no longer obligated to collect or remit Utah sales and use tax. | |
| Vermont | Vermont Department of Revenue – E-mail from Mr. John Bagwell on 5-8-03 | “Vermont has no statute or cases that would require the out of state retailer to collect tax once the nexus tie has been broken. It would be nice if we could. My guess is it takes some amount of time for the retailer to stop collecting the tax and thus at least for the period they are still collecting it we would expect remittance.” | |
| Virginia | Mr. Beau Baez – MTC CCH – State Tax Reporter | Per letter ruling: nexus ends the day the business leaves the state If a dealer ceases to conduct his business at the place indicated on the Certificate of Registration, the certificate immediately expires. The dealer is required to notify the Department of Taxation in writing within 30 days and return the Certificate of Registration. | Information provided by Virginia Department of Revenue in response to an MTC survey conducted in 1998. Virginia Department of Taxation, 23 VAC 10-210-290. The Virginia Tax Administrative Code (VAC) is regulatory. |
| Washington | CCH – State Tax Reporter | Once nexus has been established, it will continue up to five years, notwithstanding that the instate activity which created nexus has ceased. | Washington Administrative Code, 458-20-193(7)(c). This is regulatory. |
| West Virginia | West Virginia State Tax Department – Telephone call to Department on 7-1-03 | Foreign (out-of-state) retailers may voluntarily register to collect tax on sales to customers in West Virginia. There appear to be no provisions in the tax code requiring out-of-state retailers to collect tax once they have left the state. | |

| State | Source | State Policy on Duration of Nexus / Other Information | Authority |
|-----------|--|---|---|
| Wisconsin | Wisconsin Department of Revenue – E-mail from Ms. Julie Christensen, Tax Specialist, on June 23, 2003 | Wisconsin policy is to require the out-of-state retailer to report and remit tax through the end of their current reporting period (after nexus creating activities cease). For example, if the out-of-state retailer is on a quarterly filing basis and terminates the contract with the in-state agent on February 1, 2003 and has no other nexus creating activities in the state, our policy would be to require them to collect Wisconsin sales and use tax through the end of that quarter, or March 31, 2003. The Department does not have a formal policy that describes this. It is just internal policy. The Department does not feel that it can constitutionally require a retailer to continue to collect the tax since nexus no longer exists. | |
| Wyoming | Wyoming Department of Revenue – E-mail from Ms. Shanda B. Palochak, Taxability Specialist, Excise Division, on July 14, 2003 CCH – State Tax Reporter | Wyoming statutes do not delineate a specific time frame in which a vendor must continue to collect and remit sales tax after the vendor has withdrawn its presence from Wyoming. State statutes do require sales tax be collected on Wyoming sales made by a licensed vendor. Once nexus is terminated, the vendor must notify the Department of Revenue and formally cancel its license. Until the license is cancelled, the out-of-state retailer is statutorily required to collect and remit sales to in-state customers. A lack of due diligence in canceling the license does not eliminate our collection and remittance requirements. License Cancellation. “Vendors shall request cancellation of their sales/use tax license when no longer engaged in business activities which require the license. The vendor shall provide the Department with a written cancellation request and shall be in good standing with all sales/use tax requirements before the license may be canceled. All canceled licenses shall be surrendered to the Department upon request for cancellation.” | Wyoming Department of Revenue – Rules and Regulations, Chapter 2, Section 5 |